Musyoki v Joshua & another (Civil Appeal 7 of 2017)
[2024] KEHC 6761 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6761 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 7 OF 2017

FROO OLEL, J

JUNE 7, 2024

BETWEEN

MUTUA MUSYOKI ..... APPELLANT

AND

MUNYAKA JOSHUA ..... 1ST RESPONDENT

PATRICK MUTHENGI KIMANZI ..... 2ND RESPONDENT

(Being an Appeal from the Judgement of Honourable C.A. Ocharo -Principal Magistrate delivered on 14{{^th}} February 2017 in Machakos Cmcc No 901 of 2015)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable C.A. OCHARO P.M dated 14th February 2017, delivered in MACHAKOS CMCC No. 901 of 2015 where she dismissed the Appellants suit on the basis that he failed to prove liability on part of the respondents in causing the said accident.

2. Being aggrieved by the said decision, the Appellant raised seven (7) grounds of Appeal namely;

    a. The learned Magistrate erred in law and in fact in that she failed to find that the case was a civil case and the Appellant proved the elements of negligence as required by law and thereby the court imposed a higher degree of proof on the part of the Appellant, hence arrived at a wrong decision.

    b. The trial Magistrate erred in law and in fact by failing to apply the doctrine of res ispsa loquitor as was pleaded in the plaint.

c. The trial Magistrate erred in law and in fact by dismissing the plaintiff's suit on the sole ground that he omitted to mention motor vehicle registration Number KCC 105P, yet this motor vehicle was not to blame for causing the accident.

d. The trial Magistrate erred in law and in fact in that she failed to find that the vehicle which caused the accident had already been properly identified both in the plaint as well as by the investigating officer in his evidence.

e. The learned Magistrate erred in law and fact in that she disregarded the Appellants submissions and judicial authorities on liability and quantum of damages with the resultant miscarriage of justice to the appellant.

f. The learned trial Magistrate erred in law and in fact, in that she found the evidence of the Appellant did not prove to the required standards, the particulars of negligence as pleaded in paragraph 5 of the plaint, in spite of the respondents having pleaded contributory negligence against the Appellant.

g. The learned Magistrate erred in law and fact by failing to evaluate the entire evidence on record and making a finding that the appellant had proved his case against the respondents on balance of probabilities and thereby arrived on a wrong finding on the issue before court.

3. The Appellant therefore prayed that this Appeal be allowed, the judgment of the trial court be set aside and an award of general damages do issue based on the injuries sustained by the Appellant.

B. The Pleadings

4. The Appellant filed the primary suit and deponed that on or about 13.07.2015 he was lawfully driving motor vehicle registration number KCC 695 Nissan Vanette (hereinafter referred to as the 1st suit motor vehicle) along Machakos – Kitui Road, when at Kitooni Area, the 2nd defendant by himself , his driver and/or servant negligently and carelessly drove and managed motor vehicle registration Number KBL 614P (hereinafter referred to as the 2nd Motor vehicle), that he caused the same motor vehicle to lose control, veer off its lane and caused it to collide with the 1st suit motor vehicle and as a result the 1st suit motor vehicle rolled several times, landed in a ditch and the Appellant sustained severe injuries thereby suffering loss and damages.

5. The Respondents filed their joint statement of defence wherein they denied liability for this accident either directly and/or vicariously and put the Appellant to strict proof thereof. The respondents further denied owning the 2nd suit motor vehicle and/or the fact that an accident did occur on the material date as between the 1st and 2nd suit motor vehicles. In the alternative and without prejudice to the above the respondents did aver that if indeed an accident did occur then it was caused by the negligence of the driver of the 1st suit motor vehicle, and therefore they were not to blame for the accident. The respondents therefore prayed for the suit to be dismissed.

C. Evidence at trial

6. The Appellant testified adopted his witness statement as his evidence, wherein he narrated how the accident occurred as explained in the plaint. As a result of the said accident he had suffered soft tissue injuries being bruises on the right arm, Fracture of the right arm joint , with lacerations, blunt injury to the right hip joint, blunt injury to the right shoulder, blunt injury to the right knee, Deep cut wound on lower lip need stitching, blunt injury to the left cheek, blunt injury to head and left knee. The plaintiff produced his claim supporting documents and further stated that he had recovered but still

had a problem with his right shoulder and was not able to lift heavy loads. In cross examination, the Appellant admitted that there were three vehicles involved in the accident, he was not driving in a zig zag manner nor was he to blame for the same.

7. PW2 PC John Kanyoro, testified that he was the investigating officer of the said accident, which occurred on 13.07.2015 at about 7.30pm around Kitooni area near Masii Town. The said accident involved three (3) motor vehicles, being the 1st the 2nd suit motor vehicles and motor vehicle registration Number KCC 105M MATATU (hereinafter referred to as the 3rd suit motor vehicle) The 2nd and 3rd suit motor vehicles were being driven from Machakos direction towards Kitui, while the 2nd suit motor vehicles was being driven from Kitui towards Machakos direction. The respondent's driver, caused the accident by hitting the 3rd suit motor vehicle from behind and caused it to veer off its lane to the right where it collided with the 1st suit motor vehicle.

8. As a result of this accident, four passengers in the 1st suit motor vehicle died while undergoing treatment at Machakos level 5 hospital, while the appellant sustained serious injuries. PW2 further testified that he did visit the scene of the accident and recommended that the driver of the respondent's (2nd suit motor vehicle) be charged with the traffic offence of causing death by dangerous driving. In cross examination he confirmed that he visited the scene of the accident, immediately thereafter and found all the three vehicles at the scene. He reaffirmed that the accident was caused by negligence of the driver of the 2nd suit motor vehicle, when he knocked the 3rd suit motor vehicle, it veered off its lane and crashed into the 1st suit motor vehicle.

9. PW3 Dr Judith Kimuyu, testified that she worked at Machakos level 5 Hospital and confirmed having examined the Appellant on 12.10.2015. She also relied on the P3 form and treatment notes from Machakos level 5 Hospital and proceeded to compile her observations in her Medical report which she produced into evidence. In her opinion the Appellant suffered from soft tissue injuries and had no permanent disability. He should have recovered well from the same.

10. The Respondents opted not to call any witness and proceeded to close their case.

D. Submissions

(i). Appellant's Submissions

11. The appellant filed his submission dated 19th October 2024 and faulted the trial Magistrate for wrongly analyzing the evidence tendered, which indeed proved that the accident occurred and it was caused by negligence of the respondent's driver. As a result of the said accident four passenger's in the 1st suit motor vehicle had died and the investigating officer, had recommended that the respondents driver be charged with the offence of causing death by dangerous driving. Both documentary and oral evidence did point to the respondent's driver culpability, but unfortunately the trial court ignored the same and arrived at a wrong determination not supported by the evidence adduced.

12. The Appellant further stated that had proved the four key elements of negligence, which unfortunately the trial magistrate had not addressed and this included duty of care, a breach of that duty, causation, and damages. A defendant must own a "duty of care" to the person bring the claim, in the sense that the claimant fell within a class of interests which the law considers should be protected. There must be a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damages alleged must be protected by law. Reliance was placed Christine Kalama Vs Jane Wanja Njeru & Another (2021) Eklr where the said principles were expounded.

13. The respondent's driver owed the appellant and other road users, a duty of care and it was proved by the evidence of PW2, that indeed he did breach the same and was to blame for causing the said accident. Causation was therefore laid bare, showing that the respondent's driver was negligent and as a result the Appellant had suffered severe injuries. The trial Magistrate was therefore wrong in dismissing the Appellants claim, yet the same had been proved on a balance of probabilities. The Appellant further faulted the trial magistrate for failing to consider the principle of Res ispa Loquitur. The said principle, created a rebuttable presumption of negligence on the respondents, that the Appellant would not have suffered injuries pleaded, had it not been for the accident caused by the respondent's driver recklessness and negligence. Reliance was placed on Margaret Waithera Maina Vs Micheal k Kimaru (2017) Eklr to emphasis on the same.

14. Finally, the respondents had not presented any evidence to rebut the Appellants evidence and whatever was raised in the statement of defence remains mere allegations. The Appellant evidence therefore remined unchallenged and ought to have been considered as sufficient to prove the respondent's negligence. As regards quantum the Appellant urged this court to hence the same to Ksh.650,000/= considering similar injuries for similar awards.

15. The Appellants therefore prayed that this Appeal be allowed on the said terms. The respondent did not participate in this Appeal

Analysis and Determination

16. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. This is the principle espoused in section 78 of the *Civil Procedure Act*.

17. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

18. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. The Appellant challenges the trial court judgment both on her finding on liability and quantum.

i. Whether the Appellant discharge the Burden of Proof

19. Section 107(1) of the *Evidence Act* provides that;

> " whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist."
>
> Section 108 of the *Evidence Act* further provides that;

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

20. I also refer to The Halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutional evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

21. In the case of Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR it was held that

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

22. The Question then is what amounts to proof on a balance of probabilities was also discussed by Kimaru J in William Kabogo Gitau Vs George Thuo & 2 others (2010) 1 klr 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased in his case are more likely than not to be what took place.in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

23. The trial Magistrate did dismiss the Appellants suit on the basis that his evidence was contradictory as compared to PW2, who gave the correct version of how the accident occurred and proceeded to wonder why due to such serious contradiction as to the circumstances of the accident, the Appellant did not call an independent witness to confirm the circumstances under which the said accident did occur. The court proceeded to find that the Appellant had not proved the particulars of negligence as pleaded on balance of probability and therefore dismissed the Appellants claim.

24. It is not disputed that in his pleadings, the Appellant did not bring out the role of the 3rd suit motor vehicle in the said accident, nor did he attribute any fault on its driver, but when he tendered his evidence the Appellant confirmed in cross examination that three motor vehicles were involved in the said accident, a fact further clarified and confirmed by PW2 who was the investigating officer. This was therefore an issue which though not pleaded was actively canvassed by the parties in examination in chief and cross examination and they left it for the court to make a determination, while determining the extent of the respondent's liability in causing the said accident.

25. In odd Jobs Vs Mubia (1970) EA 476, it was held that the court can base its decision on an unpleaded issue if the parties had left the issue to the court for determination. The court of Appeal in the case of Wairimu Wanjohi Vs James Wambiru Mukabi (2021) eKLR also stated that odd jobs (supra) remains good law, that in limited circumstances where an unleaded issue is crucial to the matters at hand, the court may determine a suit on the unpleaded issue provided both parties have clearly addressed the unpleaded issue in their evidence or submissions and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.

26. Therefore, involvement of the 3rd suit motor vehicle though not pleaded, was a live matter raised in evidence and the trial court therefore erred in failing to determine the issue of liability as between the three motor vehicles that were involved in the said accident. Secondly it was clearly proved by evidence of PW2, the investigating officer that it was the 2nd suit motor vehicle, which violently knocked the 3rd suit motor vehicle from the back causing it to lose control, veer off its lane and leading it to crash into the 1st suit motor vehicle, which the Appellant was driving. The evidence adduced clearly showed that it was the respondent driver who was negligent and this evidence was not rebutted by the respondents who failed to call any witness to testify in rebuttal.

27. As held by Justice Hayanga in Frida Kimotho Vs Ernest Maina {2002} Eklr, where he quoted with approval Simmons L.J in Woods Vs Duncan 1946 AC 419, where he held that ;

> "I accept Mr Fraser Murray's proposition that the respondents (defendants) can avoid liability if they can show either that there was no negligence on their part which contributed to the accident, or that the accident was due to circumstance's not within their control."

28. Further as held in Christine Kalama Vrs Jane Wanja Njeru & Ano (2021) eklr wherein the high court had this to say;

> "It is a basic element of a cause of action in negligence that the claimant can allege the he or she has suffered loss and damage falling within the scope of duty of care owed to her or him by the defendant. For that matter, it was the duty of the Appellant to show that she was owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents. How is the scope of negligence and duty of care determined?
>
> 1. First that the respondents owed duty of care to the Appellant.
> 2. Second, that the respondents breached that duty of care in the manner of their driving.
> 3. That the breach caused the Appellant to suffer personal injuries attracting recoverable damages at law.

4. That the injuries suffered by the Appellant was as a result of the breach and negligence, which was reasonably foreseeable.

In Caparo Industries PLC Vs Dickman (1990) 1 ALL 586 and Chun Pui Vrs Lee Chuen Tal (1988) RTR 298 highlighted the determinants of negligence as follows; "The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is; the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damages and foreseeability of the particular type of damage caused."

29. The evidence of the respondent's negligence as pleaded and as lead by the evidence of PW2 was sufficient and confirmed that the respondent's driver primarily caused this accident and breached the duty of care to other road users. As a direct result of his negligence, the Appellant did suffer damages and the respondents therefore ought to have borne 100% liability for the same.

(II) Whether Quantum Awarded was adequate.

30. Though the Appellants suit was dismissed, the court proceeded to propose an award damages for Ksh 150,000/= as required in law. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 Stated:

" Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

'An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded "on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ..."

31. The Court of Appeal in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 held that:

" The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

32. The Appellant pleaded that as a result of the said accident he suffered the following injuries; Blunt injury on the head, right forearm with fracture of the distal radius, blunt injuries on the right hip and right knee with bruise and also bruises on the left knee. The said injuries were confirmed by the treatment notes, details in the P3 form and medical report of PW3 Dr Judith Kimuyu, who also testified and confirmed the said injuries. In her opinion the suffered bone and soft tissue injuries with no permanent incapacity.

33. The appellate court is only entitled to increase an award of damages by the trial court if it is so inordinately low that it represents an entirely erroneous estimate. While, the court appreciates that

one person's injuries will never be fully comparable to another person's injuries, the same still has to considered as far as possible and compared to another person's similar injuries and its after effect. In Patrisia Adhiambo omolo Vs Emily Mandala (2020) eklr the high court upheld an award of Kshs.180,000/= where the plaintiff has suffered similar injuries for fracture of left ulna radius and ulna bones, colles fracture of the fore arm, multiple bleeding wounds.

34. In JaldEssa Diba T/A Dikes Transporters & Another Vs Joesph Mbithi Isika (2013) Eklr, the court awarded Ksh.350,000/= for fractured and dislocated right clavicle amongst other soft tissue injuries, while in Gogni construction company limited Vrs Francis Ojouk Olewe (2015) eKLR, the claimant was also awarded Ksh.350,000/= as general damages having sustained a future of the left distal radius and ulna and dislocation of left elbow and was hospitalized for 6 weeks.

35. The award proposed by the trial court is therefore within not with range of similar injuries, especially considering the fracture of the distal radius as proved by the Appellant. I would interfere with the same and increase the same to Kshs.250,000/= .

Disposition

36. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal succeeds. The Judgment/ decree of the trial court is hereby set aside and substituted with a finding that the respondents are 100% liable for the accident which occurred on 13.07.2015. General damages is also awarded to the tune of Ksh.250,000/= plus costs and interest.

37. The Respondents never participated in this Appeal, and for that reason each party shall bear their own costs.

38. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of June, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court assistant